UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
CLIFTONDALE OAKS, LLC,	:	04-95161-WHD
Debtor.	:	
_____	:	
CLIFTONDALE OAKS, LLC,	:	
Movant,	:	
v.	:	
METRO BROKERS, INC.	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Respondent.	:	BANKRUPTCY CODE

O R D E R

Before the Court is the objection to the claim of Metro Brokers, Inc. (hereinafter the "Broker"), filed by Cliftondale Oaks, LLC (hereinafter the "Debtor"). This matter is a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(B); § 1334.

FINDINGS OF FACT

1. On October 31, 2001, James Spencer, on behalf of the Debtor, executed a document titled "Exclusive Right to Sell Listing Agreement" (hereinafter the "First Listing Agreement"). The First Listing Agreement expired by its own terms prior to May 24, 2004. On May 24,

2004, Spencer, on behalf of the Debtor, executed a second document titled "Exclusive Right to Sell Listing Agreement" (hereinafter the "Second Listing Agreement"). The term of the Second Listing Agreement was May 24, 2004 through December 31, 2006.

2. The First and Second Listing Agreements (hereinafter the "Listing Agreements") were entered between the Debtor, as the "Owner," and Metro Brokers, Inc., d/b/a Builder Developer Marketing Group of Metro Brokers, Inc., as the "Broker."

3. At the time the Debtor entered the Listing Agreements, the Debtor owned approximately 52 acres of land located in South Fulton County, Georgia (hereinafter the "Property"). The Debtor intended to develop the Property into a residential subdivision consisting of 83 lots. *See* Debtor's Disclosure Statement, Docket Number 24 (November 1, 2004).

4. On July 2, 2004, the Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The Debtor did not list the Second Listing Agreement as an executory contract and did not schedule the Broker as a creditor.

5. The Debtor's confirmed Chapter 11 plan provides that "[a]ll executory contracts of Debtor, except those contracts expressly assumed . . . , shall be deemed automatically rejected." The plan further provides that this deemed rejection will be effective only if the Debtor's plan is confirmed. Pursuant to the plan, a claim for damages resulting from the rejection of an executory contract must be filed within 30 days of confirmation of the plan and is classified as a general unsecured claim.

6. The Debtor did not expressly assume the Second Listing Agreement.

7. On or around August 18, 2005, after the Debtor's efforts to obtain approved post-petition financing for the development of the Property failed, the Debtor sold the Property to John Wieland Homes and Neighborhoods, Inc. for approximately $1.6 million.

8. On August 12, 2005, the Broker filed a proof of claim evidencing an unsecured claim for $96,000.[1] Attached to the proof of claim is a copy of the Second Listing Agreement.

9. The Second Listing Agreement provides as follows:

> At all times and places used herein the term "Property will refer to the following described property, improved or unimproved, as consistent with the context in which the term is used: PROPERTY LEGAL DESCRIPTION: All lots developed in land lot(s) 125, 128 of the 14FF District . . . as recorded in Plat book 29349, 29240 page(s) 512, 235 Fulton County, Georgia more commonly known as Cliftondale Oaks subdivision.

10. Section I of the Second Listing Agreement is titled "Exclusive Right to Sell Contract Prior to Placing Improvements On the Property." Within this section, the agreement provides as follows:

> TERM: Broker agrees to use its best efforts to sell the "Property" within the terms of this contract, and "Owner" does hereby authorize and give Broker the exclusive right and power to sell said "Property" from the date hereof until 12:00 o'clock midnight the 31st of December, 2006.
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> ***
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> COMMISSION: Owner agrees to pay Broker a sales commission of 5.5% . . . plus .5% . . . for marketing fees for a total of 6% . . . of the HUD-1 closing statement sales price on each co-op sale, and a sales commission of 5% . . . plus 1% . . . for marketing fees for a total of 6% on each direct sales (sic) in the event that during the terms of this contract (1) the Broker or any

[1] The claim was originally filed as a secured claim, but was amended to an unsecured claim by claim number 19, which was filed on October 27, 2005.

other licensed Georgia real estate broker procures a person ready, willing, and able to purchase said "Property" at the price stated above; (2) the "Owner" enters into an enforceable contract for the sale or exchange of said property with any purchaser, whether by or through the efforts of Broker or any other person, including Owner and the closing occurs. The commission payable to the sale or exchange of "Property" are not set in any manner other than between Broker and Owner. Owners agree to pay Broker such commission as stated above, if within ninety (90) days after termination of this agreement, said property is sold, exchanged, or conveyed to any person to whom the "Property" has been submitted during the life of this Agreement, unless the property is sold through another licensed real estate broker with whom the Owner or Owner's Grantee had made an exclusive listing contract. Owner agrees to refer all inquiries concerning the sale of the property to Broker during there (sic) thereof.

CONCLUSIONS OF LAW

The Debtor has objected to the Broker's proof of claim and seeks disallowance of the claim. Rule 3001(f) of the Federal Rules of Bankruptcy Procedure provides that "[a] proof of claim properly executed and filed in accordance with the Bankruptcy Rules constitutes *prima facie* evidence of the validity and amount of the claim." FED. R. BANKR. P. 3001(f). Accordingly, the proper filing of a claim creates an evidentiary presumption in favor of the claimant as to liability and amount of the claim. *See Whitney v. Dresser*, 200 U.S. 532 (1906)*; In re Schwegmann Giant Super Markets*, 287 B.R. 649 (E.D. La. 2002); *see also In re Garner*, 246 B.R. 617, 620 (Bankr. 9th Cir. 2000). "Once the claim is disputed, however, the claimant is obligated to prove up its claim, with the burden allocated as it would be outside of bankruptcy, without regard to Bankruptcy Rule

3001(f)." *In re Coates*, 292 B.R. 894, 904-05 (Bankr. C.D. Ill. 2003); *see also In re Atwood*, 293 B.R. 227 (Bankr. 9th Cir. 2003) ("A secured claim holder has the burden of proving the reasonableness of its fee claim, whether under § 506(b) or under § 1322."). Because the Debtor has sufficiently disputed the Broker's claim, the ultimate burden of proof rests with the Broker.

The Debtor asserts that the Second Listing Agreement was not valid due to fraud in the inducement or, in the alternative, that the Broker failed to perform its obligations under the contract, presumably resulting in a pre-petition breach of the contract by the Broker. Having considered the evidence presented, the Court finds insufficient evidence to support either contention. It appears to the Court that the Second Listing Agreement was valid and that the Broker was in compliance with its obligations to market the Property at the time the Debtor filed its petition, and therefore, had not breached the agreement prior to the petition date.

Both parties agree that the Second Listing Agreement is an unexpired, executory contract. This conclusion is supported by the case law addressing the issue of whether a listing agreement, which has not yet been terminated or performed by the broker, is an executory contract. *See In re Lady Baltimore Foods, Inc.,* 2004 WL 2192374 (Bankr. D. Kan. Aug. 13, 2004) (listing agreement constituted an executory contract because broker had not produced a ready, willing, and able buyer prior to the filing of the debtor's petition); *In re W/B Assocs.,* 227 B.R. 635, 637 (Bankr. W.D. Pa. 1998) (exclusive listing

agreement was not executory contract because broker had fully performed its obligation to procure a buyer prior to the petition date); *In re Murtishi*, 55 B.R. 564, 569 (Bankr. N.D. Ill. 1985) (exclusive listing agreement was not an executory contract because the real estate agent had produced a ready, willing, and able buyer prior to the filing of the petition).

The Second Listing Agreement had not expired as of the petition date. Both parties had unperformed obligations at the time of the Debtor's rejection of the agreement.[2] There is also no evidence to support a finding that either the Debtor or the Broker had terminated the Second Listing Agreement prior to the time the Debtor filed its petition. Accordingly, because it was an unexpired, executory contract, the Debtor could have either assumed or rejected the Second Listing Agreement. As the Debtor did nothing to expressly assume the Second Listing Agreement, in accordance with the terms of the Debtor's confirmed plan, the Second Listing Agreement was deemed rejected.

Section 365 of the Code provides the trustee or the debtor-in-possession with the power to assume or reject any executory contract of the debtor. 11 U.S.C. § 365(a). Rejection of an unassumed, executory contract constitutes a breach of the contract. This breach is deemed to have occurred immediately before the date of the filing of the debtor's bankruptcy petition. 11 U.S.C. § 365(g)(1). A deemed breach of a contract

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[2] Whether a contract is executory is determined at the time of the assumption or rejection. *See In re Value Music Concepts, Inc.*, 329 B.R. 111 (Bankr. N.D. Ga. 2005) (Bonapfel, J.)

gives rise to a prepetition general unsecured claim for damages. *See* 11 U.S.C. § 502(g). This claim "shall be determined, and shall be allowed under [§ 502(a), (b), or (c)] or disallowed under [§ 502(d) or (e)], the same as if such claim had arisen before the date of the filing of the petition." *Id*.

Consequently, the Second Listing Agreement is considered to have been breached by the Debtor immediately prior to the filing of the Debtor's petition. The Broker is entitled to an unsecured claim for the damages resulting from the breach of the contract. The amount of damages resulting from the deemed breach of an executory contract is determined with reference to state contract law. *See Lindermuth v. Myers,* 84 B.R. 164 , 166 (D.S.D. 1988) ("In making the determination under § 502 as to the extent of the claim to be allowed, the Court must go beyond the bankruptcy code to the substantive law governing the rejected contract."). Under Georgia law, damages for the breach of a listing agreement appear to be measured by reference to the amount the broker would have earned as a commission under the listing agreement. In most cases, the assessment of the damages is easy, as the broker has either produced a buyer who purchased the property or the seller has sold the property through the efforts of another broker or his own efforts, and the damages are equal to the amount of the commission calculated with regard to the actual sale price.

The question here is whether it is proper to calculate the Broker's damages based on the 6% commission provided in the Second Listing Agreement. The Debtor argues that the commission provided in the Second Listing Agreement was payable only in the

event the Debtor sold developed lots or completed homes. In response, the Broker asserts that the language of the Second Listing Agreement is broad enough to include the sale of the entire Property or any portion thereof.

Under Georgia law, "[e]ach contract by which one employs another to sell real estate must be construed according to its particular stipulations." *King Industrial Realty, Inc. v. Worthington Custom Plastics, Inc.*, 249 Ga. App. 501 (Ga. App. 2001). "If the terms used are clear and unambiguous, they are to be construed according to their plain, ordinary and popular sense." *Id.*

Having considered all of the provisions of the Second Listing Agreement, the Court finds that the parties intended a commission of 6% to be payable upon the sale of the Property made within the term of the Second Listing Agreement. The Second Listing Agreement provides for a commission to be paid if "the Broker or any other licensed Georgia real estate broker procures a person ready, willing, and able to purchase said 'Property' at the price stated above" or the "'Owner' enters into an enforceable contract for the sale or exchange of said property with any purchaser, whether by or through the efforts of Broker or any other person, including Owner and the closing occurs." Under either alternative, the Second Listing Agreement provides that a commission is earned only upon the sale of the "Property." The question then is whether the term "Property" is intended to include the entire parcel of raw land or merely developed lots or improved land.

"Property" is defined within the contract as the "following described property, improved or unimproved, as consistent with the context in which the term is used: PROPERTY LEGAL DESCRIPTION: All lots developed in land lot(s) 125, 128 of the 14FF District . . . as recorded in Plat book 29349, 29240 page(s) 512, 235 Fulton County, Georgia more commonly known as Cliftondale Oaks subdivision.." Because of this definition, the Debtor asserts that the term Property was only intended by the parties to encompass "lots" that had been developed. The Court disagrees. Taken in context, the entire definition suggests that the wording "all lots developed" is simply part of the legal description of the Debtor's land, included solely to identify the parcel of land, and was not intended by the parties to limit the definition of the term "Property" to only those lots that had been "developed" in a construction sense. The beginning of the definition broadens the property at issue to include the described property, improved or unimproved, and implies that the parties intended the agreement to cover the sale of the Property in any condition. Although the phrase "improved or unimproved" is not defined within the document, the Court finds that the use of this phrase is consistent with the parties' intention that a commission would be paid upon any sale of the Property, whether or not the Property had been altered in any way.

The Court also heard testimony from the Debtor's principal and from the Broker's agent with regard to the parties' understanding of the agreement and their intentions at the time of executing the agreement. Having considered and weighed the credibility of

the testimony, the Court is persuaded that this testimony also supports a finding that the definition of "Property" was intended to include the sale of the entire tract.

CONCLUSION

For the reasons stated above, the Debtor's objection to the claim of Metro Brokers, Inc. is **DENIED**.

IT IS SO ORDERED.

At Atlanta, Georgia, this _____ day of February, 2006.

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W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE